Protecting the City of London? UK challenges before the Court of Justice of the European Union

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Last November Advocated General (AG) Jääskinen finally addressed, in a much-awaited legal opinion,[1] the UK's challenge to the so-called bankers' bonuses 'cap' under EU capital requirements legislation (Directive 2013/36/EU ('CRD IV') and Regulation (EU) No 575/2013 ('CRR')).[2] The AG suggested to the Court of Justice of the European Union (the Court) that the action be dismissed. This, it appears, will be the final word on the matter. Following the opinion's release, the Chancellor of the Exchequer announced that he would drop the action before the Court.[3]

Besides the disagreement on how to regulate bankers' bonuses, the judicial challenge also reflected the UK's discontent – already obvious in its challenge to Article 28 of the short selling regulation[4] – with losing authority to the EU on matters of importance to the UK. The AG's opinion is noteworthy for turning a common policy argument against the CRD IV bonuses 'cap' somehow on its head. The argument in question is that the CRD IV provisions on bonuses (or more precisely, the provisions on the *variable* component of the total remuneration) will merely serve to push up the *fixed* component of the total remuneration and that therefore the EU's action on bonuses is simply inadequate.[5] I will begin by introducing the basic points of contention, even though I will not examine all of the UK's submissions.

At stake were a number of provisions of the CRD IV and the CRR which the UK asked the Court to annul. In short, the provisions in question (i) establish a ratio between the fixed and variable components of the total remuneration of certain employees in financial institutions (the so-called bonuses 'cap'); (ii) vest in this context the European Banking Authority (EBA) with the task of specifying certain requirements by way of draft technical standards and; (iii) establish certain disclosure obligations regarding remuneration practices. The UK made the following submissions: it disagreed with the choice of the Treaty legal base upon which the measures are based; it claimed that the principles of proportionality and subsidiarity were not satisfied; it submitted that the contested measures were brought into effect in a way which was contrary to the principle of legal certainty; it argued that the allocation of certain powers/tasks to the European Commission and EBA was *ultra vires*; it sought to reject the disclosure obligations for infringing principles of data

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[1] Opinion of AG Jääskinen, Case C-507/13 *UK v European Parliament and Council.*

[2] OJ [2013] L176/338; OJ [2013] L176/1.

[3] A Barker, 'Osborne gives up on challenge to bank bonus cap' (Financial Times, 20 November 2014).

[4] P Schammo, 'Protecting the City of London? UK challenge to EU agency law' (2014) 35 *The Company Lawyer* 33-34.

[5] See Barker, 'Osborne gives up on challenge to bank bonus cap' (n 3); EuroActiv, 'Britain sues EU over banker bonus cap' (26 September 2013).

protection and privacy; and it challenged the EU's requirements by claiming that certain provisions had extra-territorial effect.

The AG disagreed. He was not convinced by the extra-territoriality argument; nor did he agree with the argument that the right to privacy and data protection laws had been infringed. Regarding the argument that the allocation of tasks to EBA (ie, the power to adopt draft technical standards) was ultra vires,[6] - a claim which could potentially have had a wider impact on EU agency law - the AG rejected the legal reasoning which underpinned the UK's claim. It is worth noting in this context that developing draft technical standards is one of EBA's core tasks. However, they must be endorsed by the European Commission in order to be binding and, according to EBA's founding regulation, they cannot involve 'strategic decisions or policy choices'.[7] The UK sought to rely on this provision in order to obtain the annulment of the CRD IV provision which vests EBA with the task of drafting the standards. But the AG found the argument to be odd given that the acts in question (the EBA regulation and CRD IV) are in the hierarchy of norms of the same level and nothing allowed concluding that one of the acts trumped the other. In any event, the AG did not concur with the underlying assumption: that EBA would be required to make strategic decisions or policy choices as a result of the provisions of the CRD IV. The UK also argued that the provisions in question should be annulled because the EBA regulation was based on Article 114(1) TFEU – a common harmonisation basis under the Treaty, but which in its second paragraph explicitly states that it cannot be used as far as the rights and interests of employed persons are concerned. For the UK the point was that EBA, in exercising its powers, would be able to affect such rights and interests. But the AG was quick in pointing out that the legal base for *establishing* an agency was irrelevant since what was at issue was a conferral of tasks which could well be justified by reference to another legal base. He also pointed out that the standards which EBA adopted were ultimately only *draft* measures and accordingly different from the measures envisaged under Article 114 TFEU.

The AG went on to reject the UK's argument that the principle of legal certainty had been breached and dismissed the claim that the principles of proportionality/subsidiarity had been infringed. As regards a subsidiarity breach, the Court has traditionally been difficult to persuade. Claiming that proportionality is breached can also be difficult to show given the broad discretion which the Court affords to the EU legislature in areas which involve political/economic/social choices and where complex assessments are required. Arguably, this will often be the case in the financial and banking areas, and especially in the present context where the answer to the question of how to improve a pre-financial crisis situation regarding excessive risk-taking was subject to debate.

The AG left the most promising claim until the end: i.e., the claim that the legal base for adopting Articles 94(1)(g) and 94(2), which are at the heart of the CRD IV approach to bonuses, were inadequate. As a reminder, at issue were the rules which determine the ratios between the fixed and variable components of the total remuneration and EBA's powers to develop draft technical standards in this context. The legal base for the measures is Article 53(1) TFEU, a provision which is aimed at facilitating the right of establishment by authorising legislative action to this effect. The UK disagreed with the choice of legal base; it contended that Article 153(2)

[6] The AG focussed on the challenge to EBA's conferral of tasks. Even though he noted that the UK sought also to challenge the Commission's powers, he did not examine this aspect because he considered the point to be insufficiently developed.

[7] e.g. Art 10(1), Regulation (EU) No. 1093/2010 [2010] OJ L331/12.

TFEU should have been used, a provision found under the Treaty title on Social Policy. This choice was significant since Article 153(5) excludes explicitly action on pay under Article 153. The AG disagreed with the UK's analysis. Regarding Article 153(5), he agreed that the provision ruled out fixing the *level* of pay.[8] But he argued that the effect of the CRD IV remuneration rules was distinctively different: article 94(1)(g) merely provided for the variable component of the total remuneration to be no greater than 100% of the fixed component, or 200% of the fixed component if this higher percentage was so authorised. The point was crucial for the AG. As long as no limit attached to the fixed component of the remuneration, the ratios did not prevent a financial institution from offering any amount by way of bonuses and ultimately any amount by way of total remuneration. In short, according to the AG, the rules did not establish a limit on the level of pay but merely established a 'structure for remuneration'.[9]

Hence, the final blow to the UK's action came in the form of a technical legal argument about the meaning of Article 153(5) TFEU. This brings me back to my initial point regarding the way in which a common policy argument, voiced notably by the Chancellor of the Exchequer in order to argue against the EU's action on bonuses, is turned on its head in order to justify EU action. Thus, the argument that the CRD IV rules on bonuses would merely push up basic salaries served the AG for rejecting the UK's challenge. For the AG, it meant that that EU legislature did not act contrary to Article 153(5) TFEU. In other words, it is because the CRD IV rules do not cap bonuses (following the interplay between the fixed and variable components) that the CRD IV rules on remuneration do not breach Treaty rules. To be sure, by using the argument in a different way, the AG did not question the policy adequacy of these rules. However, given the Court's unwillingness to engage in the context of a proportionality assessment with complex policy choices, he did not have to do so at any rate.

[8] The AG's reading of the Court's case law seems rather selective here since the Court has previously interpreted Art 153(5) as including measures targeting the 'constituents parts of pay'. See S Peers, 'Capping bankers' bonuses: a step too far for the EU?' (20 November 2014), available at http://eulawanalysis.blogspot.co.uk/2014/11/capping-bankers-bonuses-step-too-far.html.

[9] Legal opinion, para 121.